

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

JUDY SIZEMORE,	:	APPEAL NO. C-090574
		TRIAL NO. A-0700120
and,	:	
		<i>JUDGMENT ENTRY.</i>
ARTHUR SIZEMORE.	:	
Plaintiff-Appellees,	:	
vs.	:	
BETTY R. BURNS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellants Judy and Arthur Sizemore owned two adjoining pieces of property—2115 and 2117 Riverside Drive. Each parcel contained a single-family dwelling. 2115 Riverside extended all the way to the Ohio River. 2117 Riverside, on the other hand, did not. An additional parcel owned by the City of Cincinnati sat between the 2117 property and the river. In 1993 or 1994, the Sizemores sold the 2115 property to Judy Sizemore’s brother, Raymond Sester. Sester resided on that property, and the Sizemores resided at the 2117 property.

Defendant-appellee Betty Burns also lived on Riverside Drive. Burns was a licensed realtor with Sibcy Cline. The trial court found that she was a “sophisticated buyer.” She and her family had extensive experience in land speculation. This was particularly true of property on Riverside Drive. In fact, the family had entered into

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

an agreement with a few other developers to split the Riverside area into sections—each allowing the others to develop in their designated area without competition.

In contrast to Burns's experience, training, and knowledge, neither Sizemore had any significant experience with real estate. Judy had received her GED, and Arthur had completed one year of high school. In fact, Arthur had been the victim of a criminal attack, resulting in a severe head injury that significantly limited his cognitive ability.

Burns first approached Sizemore<sup>2</sup> in 2002 or 2003 and expressed an interest in purchasing the two properties for development. She again approached Sizemore prior to 2005 expressing an interest in the property. Even though the properties were separately owned, Burns negotiated the purchase of both properties.

In the spring of 2005, the parties met to inspect both properties. The trial court noted that “the Defendant, her husband, and her son were permitted to tour both homes and examine boundary lines. At no time during the inspection and negotiations did the Defendant, her husband, or her son inquire whether the Property stretched to the Ohio River; nor did Judy Sizemore say that, ‘the Property stretches to or abuts the Ohio River.’” The trial court also noted that “[e]ven though the Defendant’s experience in real estate speculation and development along the Ohio River gave her actual knowledge that few properties actually abut the river, she failed to investigate the matter any further.” Burns testified that she presumed that it did based upon stories Sizemore told about “past use and access to the river.”

After the inspection, Sizemore and Sester offered to sell the properties for \$400,000—\$200,000 for each parcel. Prior to this offer, Sizemore and Sester had

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<sup>2</sup> From this point, Sizemore refers to Judy Sizemore because, due to his head injury, Arthur had little involvement in the transaction that is the subject of this case.

received another offer totaling \$350,000, but they had declined that offer in light of the offer from Sizemore. The parties drafted the contract for each property separately; even though all parties agreed that they were being sold as a package.

The contract for the purchase of the 2117 property contained an integration clause, which stated that “this offer, when accepted, comprises the entire agreement of Purchaser and Seller, and it is agreed that no other representations or agreements have been made or relied upon.” The contract also stated, “Purchaser shall apply for financing within 3 calendar days and provide a pre-qualification letter from financial institution to Seller.” But the agreement did not indicate that the sale was contingent on this. Finally, there was no reference to whether the property extended to the river, nor did the contract contain any language indicating that the sale was contingent upon this being true. The contract indicated that the sale was “as is.”

Burns closed on the 2115 property in a timely manner. But she did not close on the 2117 property. The reason Burns gave Sizemore for failing to close was that “the lot didn’t go all the way to the river and the financing with the bank.”

In an attempt to mitigate their damages, the Sizemores tried to sell the home, but other developers told them that the property, standing alone, could not be developed and was virtually unsellable. The Sizemores also continued to pay utilities, insurance, taxes, and made repairs to the property.

When negotiations collapsed, the Sizemores filed suit against Burns. They sought specific performance—a court order requiring Burns to purchase the property—incidental damages, and attorney fees. The matter proceeded to a bench trial. The trial court issued a decision, including extensive findings of fact and conclusions of law, and found for the Sizemores. The trial court ordered Burns to purchase the home, it awarded \$44,304.60 “representing the sum of loss of use of

the original purchase price at the then-prevailing statutory pre-judgment interest from 2005 to the present day, maintenance, utility taxes, and insurance costs, plus interest at the statutory rate until fully paid.”

The trial court also made an award of attorney fees against Burns. The trial court first noted that Burns’s conduct forced the Sizemores to retain an attorney to try to resolve the matter. The trial court also noted, “the Defendant’s refusal to acknowledge her contractual responsibilities without any defense or justification for her failure to close, supports a finding of bad faith which would justify an exception to the American Rule.” This appeal follows.

In her appeal, Burns raises two assignments of error. First, she claims that the trial court erred when it ordered specific performance. Second, she claims that the award of damages, including attorney fees, was improper.

An action for specific performance is a matter in equity left to the sound discretion of the trial court.<sup>3</sup> An appellate court reviews a lower court’s decision to grant specific performance under an abuse of discretion standard.<sup>4</sup> An “abuse of discretion” is a decision that is unreasonable, arbitrary, or unconscionable.<sup>5</sup> It is more than an error of law or judgment.<sup>6</sup> It results only when no reasonable person would take the view adopted by the trial court.<sup>7</sup> We find that the trial court did not abuse its discretion in granting specific performance.

The facts in this record support the trial court’s conclusion that the Sizemores and Burns formed a valid contract. The contract contained no provision conditioning performance on the property extending to the river. It also contained

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<sup>3</sup> *Sandusky Properties v. Aveni* (1984), 15 Ohio St.3d 273, 274, 473 N.E.2d 798.

<sup>4</sup> *Id.*

<sup>5</sup> *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095.

<sup>6</sup> *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

<sup>7</sup> *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 92, 437 N.E.2d 1199.

no provision conditioning performance on the ability to later develop the property in a certain way.

Burns argues that Sizemore told her the property extended to the river, and that she relied on that representation. But the trial court did not believe this claim, finding that “Plaintiffs did not make any representations regarding the boundary lines to the Defendant.”

But even if Sizemore had made such a representation, the contract stated that the written document comprised the entire agreement “and it is agreed that no other representations or agreements have been made *or relied upon*.”<sup>8</sup> As the trial court noted, “[i]f the issue of whether or not the Property stretches to the Ohio River was material as the Defendant alleges, then the Defendant should have included it as an essential term in the contract itself.”

Further, the trial court found that “the fact that the Property did not stretch to the Ohio River was equally open to both Defendant and Plaintiff and as a result the Defendant was not justified in relying on any alleged statements by the Plaintiff.” So, even if a misstatement had been made, Burns was not justified in relying upon it.<sup>9</sup>

In a further attempt to avoid performance under the contract, Burns claims that the financing contingency had not been met. But the contract contained no financing “contingency.” A financing contingency, by its terms, usually contains some language indicating that the buyer will not be bound by the agreement if the specified financing arrangement is not met.<sup>10</sup> The clause in this case contained no such language, stating simply “Purchaser shall apply for financing within 3 calendar

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<sup>8</sup> Emphasis added.

<sup>9</sup> See *Noth v. Wynn*, (1988), 59 Ohio App.3d 65, 571 N.E.2d 446.

<sup>10</sup> See, e.g., *Weaver v. Romaniuk* (Nov. 14, 1990), 1st Dist. No. C-890642 (“This offer is contingent upon the purchaser's ability to secure an 80% first mortgage loan amortized over fifteen (15) years at an interest rate which does not exceed 11-3/4% for the first three years.”)

days and provide a pre-qualification letter from financial institution to Seller.” Nothing in this language indicates that purchase of the property was contingent upon this occurrence.

In a similar case, a purchase contract contained the following language “[t]he purchasers shall obtain financing in the amount of \$199,900.00 to be paid to the owners on the date of closing.”<sup>11</sup> When the purchase did not go through, the purchasers claimed that the clause constituted a financing contingency that had not been met. The Second Appellate District disagreed. “The agreement unambiguously obligated the Buyers to obtain financing, but nowhere did it condition the sale on their doing so. In other words, we read paragraph number four as plainly setting forth an unconditional promise by the Buyers to perform—i.e., a promise to obtain financing. If the parties had intended to structure the transaction to make the sale contingent on the Buyers' ability to secure financing, they easily could have used language to that effect \* \* \*.”<sup>12</sup>

In conclusion, the trial court did not abuse its discretion when it determined that a contract had been formed between the parties in this case and that Burns had failed to perform under that contract. As such, it did not abuse its discretion when it ordered Burns to perform under the contract. The first assignment of error is overruled.

In her second assignment of error, Burns claims that the trial court improperly awarded consequential damages and attorney fees. We disagree with the argument regarding the damages award, but conclude that the trial court improperly awarded attorney fees.

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<sup>11</sup> *Hiatt v. Giles*, 2<sup>nd</sup> Dist. No. 1662, 2005-Ohio-6536, at ¶22.

<sup>12</sup> *Id.* at ¶24.

The trial court concluded that the Sizemores lost the use of the purchase price of the property and spent money maintaining the property in various ways. The trial court also concluded that the Sizemores properly attempted to mitigate their damages by trying to find another buyer for the property. Given how Burns and the other developers had divided Riverside Drive among themselves, it is hardly surprising that such efforts were fruitless. Therefore, the trial court properly ordered Burns to compensate the Sizemores for these efforts.

The same cannot be said for the award of attorney fees. The trial court justified the award for two reasons (1) the Sizemores were forced to hire an attorney in an attempt to force Burns to close on the property, and (2) Burns acted in bad faith by her “refusal to acknowledge her contractual responsibilities without any defense or justification.” These reasons are inadequate.

Ohio has long adhered to the “American Rule” with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation.<sup>13</sup> But attorney fees may be awarded when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant.<sup>14</sup>

The Ohio Supreme Court describes the issue this way: “[a] lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.”<sup>15</sup>

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<sup>13</sup> *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, at ¶7, 906 N.E.2d 396 (citation omitted).

<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> *Kabatek v. Stackhouse* (1983), 6 Ohio St.3d 55, 451 N.E.2d 248.

Based upon inferences that could be made from this record, there may have been conduct by Burns that amounted to bad faith, but no specific findings relating to that conduct were made by the trial court. And the mere fact that Burns refused to close on the property does not amount to bad faith. We also cannot condone the award of attorney fees simply because the Sizemores hired one to facilitate settlement discussions. Such a ruling would eviscerate the American Rule.

For these reasons, the part of the second assignment of error relating to the award of damages is affirmed, and that portion awarding attorney fees is reversed.

The decision of the trial court is affirmed in part, reversed in part, and remanded to the trial court to enter judgment for the Sizemores containing what it had previously awarded absent the award of attorney fees.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on May 26, 2010

per order of the Court \_\_\_\_\_.  
Presiding Judge